IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 21

RAY BROOKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

MISCELLANEOUS

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Ray Brooks, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 14, 1953.

Opinions Below.

The order of the National Labor Relations Board [R. 24] is reported in 98 N. L. R. B. 976. The opinion of the Court of Appeals [R. 66] is reported in 204 F. 2d 899.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 14, 1953 [R. 85]. A petition for rehearing filed on June 2, 1953, was denied on December 16, 1953 [R. 89]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether an employer is required to continue to bargain with a union whose authority to represent his employees had been revoked by a majority of the employees represented by the union, without any unfair labor practice on the employer's part.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 1 to 5.

Statement.

On April 12, 1951, the Board conducted an election among Petitioner's employees. This election resulted in a majority of the employees voting for the Union. On April 19, 1951, Petitioner received in the mail a document reading:

> "We, the undersigned majority of the employees of Ray Brooks, Chrysler Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent.
>
> "We respectfully submit this petition for your consideration."

This document was signed by nine of the fifteen employees of Petitioner in the collective bargaining unit found appropriate by the Board. A duplicate of this document was, on or about the same date, received by the Union [R. 10].

On April 27, 1951, a representative of the Union wrote Petitioner and requested a meeting for the purpose of negotiating a contract [R. 16]. On May 1, 1951, Petitioner, by his counsel, sent the following reply to the Union:

> "Your letter of April 27 addressed to Mr. Ray Brooks has been forwarded to us. Both Mr. Brooks and we have been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it.
>
> "A recent decision of the United States Court of Appeals for the Sixth Circuit held in a similar situation that it would be improper to compel the employees to be represented by a discredited union and that to force them to bargain through a representative which they had repudiated would be depriving them of their rights to bargain through a representative of their choice.
>
> "Under the circumstances wouldn't it be wiser to defer the consideration of the proposed negotiations until such time as it might appear that the employees desired to have your union represent them?"

The Union made no reply to this letter [R. 41-42, 17].

The Board, after the usual proceedings issued a decision and order in which it found that the petitioner had engaged in interference, restraint and coercion of its employees in violation of Section 8(a)(1) of the Act, and had refused to bargain collectively with the Union as the

exclusive representative of the petitioner's employees in violation of Section 8(a)(5) of the Act. The Court of Appeals granted a decree of enforcement of the Board's Order [R. 85].

Specification of Errors to Be Urged.

The court below erred:

1. In failing to hold that at any time employees may revoke the authority of a labor organization to represent them as their bargaining representative.

2. In ruling that a Board certification of bargaining representatives prevents employees from revoking the authority of a labor organization to represent the employees "for a reasonable period" after the certification.

3. In ruling that petitioner was required to continue to bargain with the Union as the bargaining representative of his employees, despite the fact that a majority of the employees, without any unfair labor practice on the part of petitioner, had revoked the authority of the Union to represent them as their bargaining representative.

4. In enforcing the Board's order.

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is directly in conflict with the decisions of the United States Court of Appeals for the Sixth Circuit in *N. L. R. B. v. Vulcan Forging Co.*, 188 F. 2d 927, and *Mid-Continent Petroleum Corporation v. N. L. R. B.*, 204 F. 2d 613, certiorari denied 74 S. Ct. 71.

2. The conflict between the *Vulcan Forging Co.* case and the instant case was recognized in the court below [R. 81]. The court below also recognized that its decision

in the instant case might be in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *N. L. R. B. v. Inter-City Advertising Co.*, 154 F. 2d 244 [R. 81]. Also, in the *Mid-Continent Petroleum* case, the Sixth Circuit, after reviewing the decisions of the various circuits on the question presented by the instant case stated (204 F. 2d at p. 619):

> "From the foregoing adjudications, there manifestly appears considerable conflict in the circuits, on the issue here before us."

3. The original National Labor Relations Act, commonly known as the Wagner Act, gave employees the right to bargain collectively through representatives of their own choosing. The amended Act, commonly known as the Taft-Hartley Act, also gives employees, for the first time, the right to refrain from collective bargaining. The instant case and the *Vulcan Forging* and *Mid-Continent Petroleum* cases are the only cases arising since the passage of the Taft-Hartley Act which rule on the issue in this case.

4. Clearly, the question presented here is of fundamental importance to the administration of the Labor-Management Relations Act of 1947. Until the conflict of decisions on this question is resolved neither employers, labor organizations or employees can be certain of the effect of a Board certification upon their rights and obligations under the statute.

5. The decision of the court below is believed to be erroneous and the conflicting decisions of the United States Court of Appeals for the Sixth Circuit in *N. L. R. B. v. Vulcan Forging Co.*, and *Mid-Continent Petroleum Corporation v. N. L. R. B., supra*, correct. It is a well established common law principle that when an agency is

not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal, so long as it is unexecuted.[1] It is equally well settled that statutes in derogation of the common law are to be strictly construed.[2] The National Labor Relations Act, as amended in no place provides, or even implies, that the common law rule with respect to the revocation of an agent's authority by his principal has in any wise been limited. In fact, as the Court stated in *N. L. R. B. v. Vulcan Forging Co., supra*:

> "It would clearly be contrary to the express purpose of the Act to require the employees in this case to bargain through a representative that practically all of them had repudiated. They are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through a representative of their own choosing."

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK A. POTRUCH,
ERWIN LERTEN,
H. BURDETTE FREDERICKS,
Counsel for Petitioner.

January, 1954.

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[1] 2 Am. Jur. 37, and cases cited therein; Restatement of the Law of Agency, Sec. 118.

[2] 50 Am. Jur. 340-341, and cases cited therein.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * * *

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declined to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct

an election by secret ballot and shall certify the results thereof.

* * * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES.

Section 10. * * *.

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon

such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, in-

cluding the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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